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In the

Supreme Court of the United States

October Term, 1996

Alison Ward,
Petitioner,

v.

City of Streetsboro, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Under Title VII of the Civil Rights Act of 1964 as amended (hereinafter referred to as "Title VII"), does an employer upon receiving appropriate notice have an obligation to eliminate a hostile and offensive work environment consisting of repeated, severe harassing conduct directed toward a female employee because of her sex?

PARTIES TO THE PROCEEDING

The parties to this proceeding are Petitioner Alison Ward (hereinafter referred to as "Ward"), and Respondents City of Streetsboro (hereinafter referred to as "Streetsboro"), Mayor Sally Hensel (hereinafter referred to as "Hensel"), and Fire Chief Gerald Vicha (hereinafter referred to as "Vicha").

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW i
PARTIES TO THE PROCEEDING ii
TABLE OF AUTHORITIES iv
OPINIONS BELOW 1
JURISDICTIONAL GROUNDS 2
STATUTE INVOLVED 2
STATEMENT OF THE CASE 2
REASONS RELIED ON FOR ALLOWANCE OF THE WRIT
The Court of Appeals Decision is Inconsistent with Prior Decisions of this Court and In Conflict with Decisions of other Courts of Appeal Concerning an Important Question of Federal Law. 4
CONCLUSION 9
APPENDIX:

Opinion of the Court of Appeals dated June 24, 1996 ..... A3

Memorandum Opinion of U.S. District Court filed May 22, 1995 ..... A17

Judgment Entry of U.S. District Court filed May 22, 1995 ..... A26

Memorandum Opinion and Order of U.S. District Court filed July 5, 1995 ..... A27

Order of the Court of Appeals filed August 14, 1996 ..... A29

TABLE OF AUTHORITIES

Cases

Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991) 6

Fuller v. City of Oakland, 47 F.3d 1522 (9th Cir. 1995) 7

Garziano v. E.I. DuPont de Nemours & Co., 818 F.2d 380 (5th Cir. 1987) 6

Hansel v. Public Service Co. of Colorado, 779 F.Supp. 1126 (D. Colo. 1991) 6

Harris v. Forklift Systems, Inc., 510 U.S. 17, 114 S.Ct. 367,126 L.Ed.2d 295 (1993) 6

Kauffman v. Allied Signal, Inc., Autolight Div., 970 F.2d 178 (6th Cir. 1992) 5,6,7

Meritor Sav. Bank v. Vinson, 477 U.S. 57, 106 S.Ct. 2399,91 L.Ed.2d 49 (1986) 5,6,8

Mills v. Amoco Performance Products, Inc., 872 F.Supp. 975 (S.D.Ga 1994) 6

Waltman v. International Paper Co., 875 F.2d 468 (5th Cir. 1989) 8

Winsor v. Hinckley Dodge, 79 F.3d 996 (10th Cir. 1996) 7

Statutes

28 U.S.C. § 254(1) 2

28 U.S.C. § 1331 4

42 U.S.C. § 2000e-2(a)(1) 2

Agency Guidance

EEOC 1990 Policy Guidance on Sexual Harassment 7

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

No. 96-_____

ALISON WARD,
Petitioner,

v.

CITY OF STREETSBORO, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Alison Ward petitions the Court to grant a writ of certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit which affirmed the grant of summary judgment to Respondents on Petitioner's claim that upon receiving notice of serious harassing conduct directed toward Petitioner because of her sex, Respondents failed to take prompt and appropriate action to put a halt to the harassing conduct.

OPINIONS BELOW

All opinions and orders below are unreported.

JURISDICTIONAL GROUNDS

The United States Court of Appeals for the Sixth Circuit issued its opinion on June 24, 1996. That Court denied the Petition for Rehearing on August 14, 1996. This Court has jurisdiction under 28 U.S.C. §254 (1).

STATUTE INVOLVED

Section 703(a) of Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. §2000e-2(a)(1):

> (a) It shall be an unlawful employment practice for an employer-
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;

STATEMENT OF THE CASE

A. Statement of Facts

Petitioner Alison Ward was employed as a firefighter by Respondent City of Streetsboro Fire Department under the direction of Respondent Fire Chief Gerald Vicha. There is evidence indicating that from approximately July, 1992 through March, 1993, Ward was subjected to repeated serious harassment which continued largely unabated until Ward was placed in a hospital because of an overdose of alcohol and pills brought on by the cumulative effect of the ongoing harassing conduct. This harassing conduct included Ward's receipt of a

threatening note and a dead rat in her mailbox, various instances of water and raw crushed eggs in Ward's fire boots, eggs and water in the sleeves of Ward's fire coat, eggs in her fire gloves, the "whiting out" of Ward's name from the Fire Department sign-up schedule book for work hours, the taking of Ward's portable radio for a couple days, the taking of her uniform shirt and fire gloves, and the repeated removal of Ward's number tag identifying her mail box.

In addition, there is evidence that Fire Chief Gerald Vicha was placed on notice of this harassing conduct no later than September, 1992. Despite engaging in various activities purportedly designed to ascertain who was perpetrating this conduct toward Ward, Respondents asserted they were never able to ascertain the persons engaging in this conduct and it continued largely unabated until Ward was placed in the hospital approximately the end of March, 1993. Respondents took no disciplinary action toward anyone regarding this conduct, stating they were unable to ascertain those responsible for it. Evidence also indicated that a surveillance camera and a camcorder were available for use by the Fire Department which Fire Chief Gerald Vicha believed would have deterred persons from engaging in harassing conduct while the equipment was operating, but that Vicha refused to utilize this equipment in an effort to stop the conduct.

For the purposes of its decision, the U.S. District Court for the Northern District of Ohio in granting summary judgment to Respondents presumed that Petitioner has submitted evidence to support a finding she was subjected to harassment based upon her sex that would constitute a hostile work environment and that Respondents were placed on notice of this situation. However, the U.S. District Court concluded that Respondents could not be found liable for failure to

appropriately respond to the hostile work environment because Respondents' efforts to ascertain the perpetrators of the conduct, although unsuccessful, were reasonable. The Court indicated that although Respondents had not stopped the harassing conduct, they had made reasonable efforts to put a halt to it.

On appeal, the U.S. Court of Appeals for the Sixth Circuit recognized that the only issue before it was whether there is evidence which would support a finding Respondents failed to take prompt and appropriate action to eliminate the alleged harassment after being placed on notice of it. In upholding the grant of summary judgment to Respondents, the Court of Appeals concluded that although the efforts were ineffective in stopping the harassment, Respondents had made an appropriate attempt to ascertain the identity of the perpetrators and to halt the harassing conduct. Therefore, the Court of Appeals held that Respondents could not be held responsible for the ongoing hostile work environment based upon sex to which Ward was subjected.

The U.S. District Court in this case had jurisdiction over Ward's Complaint under 28 U.S.C §1331.

REASONS RELIED ON FOR ALLOWANCE OF A WRIT

The Court of Appeals Decision is Inconsistent with Prior Decisions of this Court and In Conflict with Decisions of other Courts of Appeal Concerning an Important Question of Federal Law.

A writ of certiorari should be granted in this case

because it is inconsistent with prior decisions of this Court indicating that under Title VII employees have a right to work in an environment free from harassment based upon sex and therefore employers have an affirmative duty to eradicate hostile or offensive work environments. In addition, the Court of Appeals decision is contrary to decisions of other courts of appeal which have indicated an employer's actions in addressing a hostile work environment must be effective in eliminating the conduct in order for the employer to avoid liability. Furthermore, the question presented in this case is an important one as females strive to enter jobs that have traditionally been male-dominated. As these efforts continue, it is very important that this Court give clear guidance to employers that they are required to provide a work environment for females that is free from harassment based upon their sex. By sending this clear message now, it will assist in breaking down the traditional barriers to equal employment opportunity for females which is a matter of great importance under federal law and policy.

The Court of Appeals misconstrued the applicable legal standards regarding Ward's sex discrimination claim. Thus, this Court in *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 106 S.Ct. 2399 (1986) recognized that under Title VII an employee has a right to work in an environment free from harassment based upon sex. The Court further indicated "... a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment." 457 U.S. at 66, 106 S.Ct. at 2405. In fact, the Sixth Circuit Court of Appeals recognized this legal standard in *Kauffman v. Allied Signal, Inc., Autolight Div.*, 970 F.2d 178, 182 (6th Cir. 1992). In discussing the U.S. Supreme Court decision in *Meritor Savings Bank v. Vinson, supra,*

Kauffman indicated at 182 "[t]he Court ... held that 'Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule and insult'". This Court in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17,21, 114 S.Ct. 367,371 (1993) reaffirmed the legal standards established in *Meritor, supra.*

Since under Title VII employees have a right to work in an environment free from harassment based upon sex, employers have a corresponding duty to provide such a workplace for its employees. Thus, the Fifth Circuit Court of Appeals indicated in *Garziano v. E.I. DuPont de Nemours & Co.*, 818 F.2d 380 (5th Cir. 1987) at 387 that Title VII "... imposes a specific duty upon employers to protect the workplace and the workers from sexual harassment". In addition, the U.S. Court of Appeals for the Ninth Circuit in *Ellison v. Brady*, 924 F.2d 872, 882 n.17 (9th Cir. 1991) stated "... employers are statutorily obligated to provide a workplace free from sexual harassment . . . ." See also *Mills v. Amoco Performance Products, Inc.*, 872 F. Supp. 975 (S.D.Ga 1994); and *Hansel v. Public Service Co. of Colorado*, 778 F.Supp. 1126, 1133 (D. Colo. 1991).

Under this legal standard, employers have an affirmative duty to seek out and eliminate a hostile work environment. See *Garziano v. E.I. DuPont de Nemours & Co., supra*, at 388; *Hansel v. Public Service Co. of Colorado, supra* at 1133. In discussing the U.S. Supreme Court decision in *Meritor Savings Bank v. Vinson, supra*, the *Garziano* court at 388 indicated "[t]he Supreme Court has also recently held that employers have an affirmative duty to eradicate 'hostile or offensive' work environments....". The U.S. Equal Employment Opportunity Commission (hereinafter referred to as "EEOC") has also stated a requirement that the employer eliminate a hostile environment.

In its 1990 Policy Guidance on Sexual Harassment at E.2), the EEOC said that "[t]he employer should take immediate and appropriate corrective action by doing whatever is necessary to end the harassment ....".

Based upon these legal standards, in order to avoid liability under Title VII an employer, upon receiving notice of a hostile work environment, must take action which is effective in eliminating it. Thus, even the Sixth Circuit Court of Appeals in *Kauffman v. Allied Signal, supra*, seems to have recognized this requirement. *Kauffman* at 184 states that employer liability can be negated "if the employer responds adequately and *effectively* once it has notice of the actions" (emphasis added). In addition, the U.S. Court of Appeals for the Ninth Circuit recognizes that if an employer's actions do not stop the harassment, it may be held to have violated Title VII. Thus, in *Fuller v. City of Oakland*, 47 F.3d 1522 (9th Cir. 1995), the court stated at 1528 that upon obtaining knowledge of harassment, the employer's obligation "... will not be discharged until action - prompt, effective action - has been taken". The court further stated at 1528-1529:

> Effectiveness will be measured by the twin purposes of ending the current harassment and deterring future harassment .... If ...(2) the remedy attempted is ineffectual, liability will attach.

In addition, the Tenth Circuit Court of Appeals in *Winsor v. Hinckley Dodge*, 79 F.3d 996 (10th Cir. 1996) apparently recognized the same requirement at 614-615 when it concluded that the employer did not take adequate remedial action based in part upon the fact that the employer's actions were ineffective since the harassing conduct continued. The Fifth Circuit Court of

Appeals also seems to have recognized the need for an employer to eliminate a hostile work environment in *Waltman v. International Paper Co.*, 875 F.2d 468 (5th Cir. 1989). In that case, the Court at 479 stated "[w]hat is appropriate remedial action will necessarily depend on the particular facts of the case - the severity and persistence of the harassment, and the effectiveness of any initial remedial steps".

The Sixth Circuit Court of Appeals decision in the instant case is clearly contrary to the above-stated legal principles. Under the Court of Appeals decision, a female can be subjected to severe ongoing harassment on the job because of her sex indefinitely, even after an employer has been put on notice of it, without the employer ever being deemed liable in a situation where the hostile conduct is perpetrated surreptitiously and the employer, without success, purportedly engages in activities to ascertain the perpetrators. Such a legal standard is inconsistent with the bedrock principle recognized by this Court in *Meritor Sav. Bank v. Vinson, supra*, that employees have a right to work in an environment free from harassment based upon sex. If an employer is not required to take effective action to eliminate a hostile work environment based upon sex, this will seriously impair the effort of females to break down traditional barriers in male-dominated positions and egregiously undermine the important federal law and policy ensuring equal employment opportunity for females in the work place.

CONCLUSION

For the foregoing reasons, it is respectfully urged that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX

A3

No. 95-3838

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ALISON WARD,
Plaintiff-Appellant,
v.
CITY OF STREETSBORO;
Sally Hensel, Mayor
Gerald Vicha, Fire Chief
Defendants-Appellees.

On Appeal from the United States District Court for the Northern District of Ohio

Filed: June 24, 1996

Before KENNEDY, JONES and CONTIE, Circuit Judges

Affirmed by unpublished per curiam opinion.

PER CURIAM:

Plaintiff-appellant, Alison Ward, appeals the judgment for defendants-appellees, City of Streetsboro; Sally Hensel, Mayor; and Gerald Vicha, Fire Chief, in this Title VII action alleging that Plaintiff was subjected to a hostile work environment, sexual harassment, and retaliation.

In October 1991, Plaintiff began her employment with the City of Streetsboro as a part-time fire fighter-emergency medical technician. In July 1992, she alleges that a series of harassing events began to occur. These events included being accused of having an affair with another fire fighter, receiving letters of a threatening nature, receiving a dead rat in her home mailbox, receiving numerous hang-up telephone calls at both her home and the fire station, having water placed in her fire boots, having her name whited out of the department sign-up book, having her name tag torn off her departmental mailbox, having eggs put in her fire boots, having her name blackened out on a department log sheet, having her portable radio taken without her consent and returned two days later with the words "ha, ha" written on it, having eggs placed in her fire gloves, and having her department uniform shirt, badge, and fire gloves taken. The person or persons who committed these actions is still unknown.

Fire Chief, Gerald Vicha, became aware of these harassing events about the third or fourth week of September 1992 when he was told by another fire fighter, Dave Fronek, that he received a threatening note in his mailbox. Chief Vicha learned Plaintiff had also received a threatening note and of other events. The fire chief took various remedial actions; however, the perpetrator of the events was not found. Although the fire department was loaned a surveillance camera

and purchased a camcorder with a telephoto lens, neither of these was used to try to catch the alleged perpetrator.

In late March 1993, Fire Chief Vicha drove Plaintiff to the hospital after he learned that she was suffering from abuse of alcohol and drugs. Thereafter, he decided to place Plaintiff on administrative leave because he was concerned that she would not be able to perform her duties, which would not only present a danger to herself, but also to other fire fighters and the public as well. Plaintiff was placed on administrative leave and told she could return to work if she provided a doctor's statement relating to her fitness and underwent a physical examination. Plaintiff was also asked to undertake a polygraph test in order to determine the origin of the harassing events. The fire department felt that it was necessary to clarify that the crimes or acts that she has alleged, in fact, had taken place. Various other fire fighters were also subjected to polygraph tests.

Plaintiff submitted a letter from her doctor stating she could return to work, but Defendants initially would not accept it because it was not written on stationery with the doctor's letterhead. Once she submitted an official letter, she returned to work. When the investigation into these alleged events was finished, nothing had been ascertained other than that Fronek admitted that he had written the threatening letter to himself. He was ultimately fired.

Plaintiff finally agreed to undertake a polygraph test, and she failed portions of this test. When the polygraph examiner asked her whether she knew who committed any of the acts, she answered "no". The polygraph examiner concluded that this response showed deception. He also concluded that her response showed deception when she

answered "no" when asked whether she had committed any of the acts herself. Finally, he concluded that she was being deceptive in her response to whether she was telling the entire truth regarding the case in question and answered "yes". Fire Chief Vicha indicated that he suspected Plaintiff might be doing the acts of harassment to herself.

There was also evidence that plaintiff refused to cooperate in the investigation. During the investigation, she was asked to report her complaints to the Streetsboro Police Department, but after an initial meeting with an officer, she indicated that she did not wish to continue to do so. Also, she initially refused to take the polygraph examination. Finally, she contended she was threatened by a non-officer of the Streetsboro Fire Department in December 1993, but indicated she would not reveal his identity even if ordered to do so by the court.

On March 28, 1994, plaintiff filed a complaint in the United States District Court for the Northern District of Ohio. The complaint alleged violations of § 703(a)(1) and § 704(a) of Title VII of the Civil Rights Act of 1964. The complaint alleged that defendants had unlawfully discriminated against plaintiff in her employment (1) by failing, upon receiving notice of these alleged harassing incidents, to take prompt and appropriate action to eliminate the harassment of plaintiff because of her sex, and (2) by placing plaintiff on administrative leave, requiring her to take a polygraph and other tests, and delaying her return to active duty in retaliation for her opposition to sexual harassment.

On May 22, 1995, the district court issued a judgment granting summary judgment to defendants on all claims in the case. Plaintiff filed a motion to alter or amend the judgment.

On July 5, 1995, the district court issued an order denying this motion. On August 3, 1995, plaintiff filed a timely appeal.

II.

This appeal involves the issue regarding the extent of an employer's obligation under Title VII of the Civil Rights Act of 1964 upon receiving notice of a female employee that she is being harassed because of her sex.

Before the district court, defendants had argued that plaintiff did not state a prima facie case of hostile environment sexual harassment because the actions directed at Plaintiff were not sexual in nature. The district court found that argument to be without merit. The district court found that the statute prohibits discrimination because of one's sex. The district court stated the following in this regard:

> It appears that, at the relevant time, Ward was the only female in the traditionally male role of fire fighter. It is entirely conceivable that she was subjected to all of these actions for the simple reason that she was a female and the other fire fighters wanted to put pressure on her, drive her out, or make her the butt of unpleasant jokes and incidents solely for their own enjoyment. There was no evidence that any other fire fighter was subjected to this type of harassing behavior.
>
> Presuming for the sake of this motion that the plaintiff can establish her prima facie case of sexual harassment, the defendants would be liable on a theory of respondeat superior only if they knew or should have known of the harassment and failed to take action.
>
> There appears to be no dispute that the defendants were

> placed on notice that plaintiff was being subjected to the various incidents of which she complains. Nobody even disputes whether the various incidents occurred. Everyone agrees, however, including the plaintiff, that the person or persons responsible for the incidents were, and still are, completely unknown.

The district court presumed for the sake of the motion that plaintiff did state a prima facie case under Title VII, which makes it unlawful for an employer to discriminate against an individual because of the individual's gender. 42 U.S.C. § 2000e-2(a)(1). Plaintiff was alleging sexual discrimination under the hostile environment theory in which an employee is subject to unwelcome sexual harassment because of her gender, and that harassment has effected a term, condition or privilege of employment.

Since the presumption by the district court that the alleged events constituted harassment because of her sex is not contested by defendants on appeal, the only issue before this court is whether there is evidence which would support a finding that defendants failed to take prompt and appropriate action to eliminate the alleged harassment after being placed on notice of the conduct. When an employer is placed on notice of harassing conduct directed at an employee because of sex, the employer is obligated to take prompt and appropriate action reasonably calculated to put a halt to this conduct. Kauffman v. Allied Signal, Inc., 970 F.d. 178, 183 (6th Cir.), cert. denied, 506 U.S. 1041 (1992).

On a motion for summary judgment, summary judgment is appropriate where there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56; United States v. Diebold, Inc., 369

U.S. 654, 655 (1962). Once the moving party satisfies his or her burden to show an absence of evidence to support the non-moving party's case, Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986), the party in opposition "may not rest upon mere allegations or denials of this pleading, but . . . must set forth specific facts showing there is a genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

In the present case, plaintiff contends that the district court erred in granting summary judgment to defendants because there is evidence which would support a finding that defendants did not act in compliance with their legal obligations regarding harassing conduct directed toward plaintiff. Plaintiff contends that the most important evidence is that the actions defendants took were ineffective, and that the conduct continued unabated for approximately seven to eight months. She argues that defendants conceded that they were unable to determine the perpetrators of any of the conduct, and that no individuals were disciplined for the conduct. Plaintiff argues that defendants' initial reaction when learning of the conduct was not to take it seriously and to delay in attempting to put a halt to it. Plaintiff also argues that the efforts which were taken were clearly ineffective in stopping the harassment, and that defendants were obligated to take reasonable additional steps to put a halt to the harassing conduct, rather than merely continuing to rely solely upon the current ineffective measures. Plaintiff alleges that defendants' measures which were limited to issuing a harassment policy, calling meetings of the fire department employees to tell them harassing conduct would not be tolerated, informal questioning of fire fighter employees regarding specific incidents, and daily checks for a few minutes by a firefighter, usually only outside the fire station, in the evenings when employees were not generally there, were insufficient. Plaintiff alleges that defendants should have used

surveillance cameras or camcorders as measures reasonably calculated to deter the harassing conduct, but failed to do so.

We do not agree with Plaintiff's argument. The evidence indicates that numerous actions were taken by defendants to stop the conduct of which Plaintiff complained and to determine who the perpetrators were. These efforts included: (1) a phone tap that was placed under the direction of Ohio Bell Security; (2) meeting with the staff of the fire department to make sure that members of the department understood that harassing conduct would not be tolerated; (3) appointing an Internal Affairs officer to try and determine who was behind the alleged conduct; (4) conducting an initial police investigation in October of 1992 by Sergeant John Taiclet; (5) allowing an exception for plaintiff to take her fire gear home to avoid water and eggs in her fire gear; (6) the initiation of a full police investigation by Sergeant Stankiewicz of the Streetsboro Police Department; (7) firing an employee who admitted writing a harassing note to himself; and (8) taking certain actions during the course of the police investigation, which included professional handwriting analyses by Dr. Phillips Bouffard of the Lake County Crime Lab, conducting polygraph examinations of certain fire department employees, conducting police interviews of fire department employees, taking written witness statements of fire department employees, and taking fingerprints of fire department employees.

After reviewing these actions, the district court concluded the following:

> In general, plaintiff complains that these steps were inadequate and ineffective to stop the harassment. She asserts that a surveillance camera should have been used because it would have stopped the harassment.

> Apparently another fire fighter, a friend of the plaintiff, arranged for a surveillance camera to be loaned to the fire department. However, Chief Vicha testified at his deposition that, although the camera was received, it was never used because there was no place in the building to conceal it while it could be focused on the Plaintiff's equipment. It was his judgment that the perpetrator(s) would not act while a camera was in full view and that installing a visible camera would only delay, not stop the harassment. He testified that the camera could not be permanently installed, so as to permanently stop the harassment, because it was borrowed equipment. A discussion was had regarding the possibility of purchasing a surveillance camera, but it was concluded that there were no funds in the budget for such a purchase. Vicha, therefore, made the judgment call that a temporary surveillance camera would not be permanently effective and would not assist in locating the perpetrator(s).
>
> Although this Court accepts the fact that an employer will be held liable for failure to take prompt and adequate remedial action where there is a known perpetrator, the Court does not believe that an employer is expected to do more than this employer tried to do to ascertain the identity of the perpetrator or perpetrators. The employer cannot be a mind-reader and the employer cannot stop something whose source is unknown. Therefore, the Court finds no basis for asserting respondeat superior liability under these facts.

We agree with the district court's analysis. Plaintiff has made much of defendants' alleged lack of adequate remedial action and complains that new and effective techniques and

strategies were not used. However, as the district court noted, Chief Vicha made a judgment call that a temporary surveillance camera would not be permanently effective in eliminating harassment or in assisting to identify the perpetrator. We believe that this was a reasonable judgment and that the fire department was not required to install, at its own expense, a hidden camera in order to ascertain the identity of the alleged perpetrators.

In regard to the camcorder, which Plaintiff also alleges should have been installed, Chief Vicha testified that he purchased it in December 1992, and that it was not used for a number of reasons. Using the camcorder to watch the parking lot entrances would have meant installing it on a vacant storefront building across the street. In discussing the issue with the police department, he decided instead to put police officers on special alert in paying attention to the parking lot. The camcorder was also needed for teaching and training purposes and installing the camcorder inside the area where plaintiff kept her gear would have made it open and obvious to the perpetrator as was the case with the surveillance camera. Finally, using the camcorder would have required constant insertion of tapes every two to four hours. Given these reservations, we do not believe that the fire department failed in its duty to take remedial action by failing to use the camcorder in order to try to catch the perpetrator of the alleged acts of sexual harassment.

Finally, there was evidence that plaintiff failed to cooperate in the investigation which the fire department initiated. After interviewing plaintiff, Chief Vicha had met with Chief Brown of the Streetsboro Police Department to discuss the matter and got a Streetsboro Police Detective, Sergeant Taiclet, involved. Chief Vicha instructed plaintiff to

take any information she had about any incidents to the sergeant. Although she met with Sergeant Taiclet once, plaintiff indicated she did not want to pursue her complaint with the police even though Sergeant Taiclet remained ready to continue the investigation even on a non-criminal basis. Plaintiff also frustrated the efforts of defendants to take prompt remedial action by refusing to report the harassing incidents immediately. In one incident, she indicated that she knew a person who had threatened her, but she refused to tell the fire department who it was.

In light of these facts, we believe there is ample evidence to support the district court's ruling that prompt and adequate remedial action was taken and that defendants took more than reasonable measures to stop the harassment of which plaintiff complained. Ample efforts were taken by defendants to ascertain the identity of the perpetrator, but they did not produce a suspect, and therefore there was no one for defendants to discipline. All that defendants could do was to make a good faith effort to take prompt and adequate remedial action to produce the identity of the perpetrator and take disciplinary action. We believe the district court properly concluded that an employer could not be expected to do more than these Defendants did in their numerous efforts to ascertain the identity of the perpetrator and to halt the harassing conduct. Therefore, the district court is affirmed on this issue.

II.

Plaintiff also asserts that because she complained about being harassed and because she refused to submit to a polygraph test as part of the police investigation, she was retaliated against by being placed on administrative leave.

Title VII prohibits discrimination against an employee because she has opposed any practice made unlawful by Title VII. 42 U.S.C. § 2000e-3(a). In order to establish a prima facie case of retaliation, a plaintiff must demonstrate that (1) she engaged in protected activity under Title VII; (2) she suffered an adverse employment action; and (3) a causal link existed between the protected activity and the adverse employment action. Steiner v. Showboat Operating Co., 25 F.d. 1459, 1464 (9th Cir. 1994), cert. denied, 115 S. Ct. 733 (1995).

In the present case, the district court found that plaintiff did not establish a prima facie case based on the following reasoning:

> There is no evidence that the administrative leave was retaliatory. There is no evidence that the requirement of a polygraph test was anything more than an attempt to get to the bottom of the alleged harassment. Other fire fighters were subjected to polygraphs in addition to the plaintiff. However, plaintiff refused to cooperate with the investigation. Chief Vicha stated that, when investigations turned up no leads, he began to suspect that the plaintiff was doing all these things to herself for some unknown reason.
>
> The Court concludes that the plaintiff has failed to establish a prima facie case of retaliation. Thus defendants are entitled to summary judgment on that portion of the plaintiff's complaint.

We agree with the district court that the record in this case lacks any evidence indicating there was any retaliatory conduct against plaintiff for opposing harassing conduct based

upon her sex. The alleged retaliatory administrative leave was the result of plaintiff's alcohol and drug abuse to which she admits. Chief Vicha indicated that he became aware of this on March 27, 1993, when he had to take her to the hospital. Plaintiff alleges that she only had to spend one night in the hospital for her drug and alcohol abuse. However, it is clear that the basis for the administrative leave was plaintiff's own admitted chemical dependency and the duty of the City of Streetsboro to preclude fire fighters and emergency medical technicians who are chemically dependant from being placed in potentially life-threatening and stressful situations. We agree with defendants that plaintiff's argument that she should not have been placed on administrative leave after only one visit to the hospital ignores the reasonable and common sense conclusion that defendants not only had a duty to plaintiff and other department employees, but also to the public as well in keeping a chemically dependent fire fighter off the street.

Furthermore, there is no evidence that this administrative leave was a pretext for retaliation. Mere conclusory statements made by Plaintiff that she was the victim of retaliatory conduct are insufficient in themselves to overcome a motion for summary judgment. See Miller v.Solem, 728 F.2d 1020, 1026 (8th Cir.), cert. denied, 469 U.S. 841 (1984). There is no evidence to suggest that plaintiff was required to take the polygraph examination for any other reason that to assist defendants in ascertaining the origin of the alleged harassment. There is no connection made between the polygraph examination and the administrative leave in the letters of the City Law Director to plaintiff's attorney, nor to Plaintiff herself. Chief Vicha testified quite clearly that the polygraph exam had nothing to do with plaintiff's administrative leave. Plaintiff also claims that there was a delay in her returning to work because the first letter she

submitted from her doctor was not accepted. We do not believe it was unreasonable for the fire department to require a letter on stationery with the doctor's letterhead, indicating that plaintiff was ready to return to work.

It is evident from the record that defendants had a duty to place Plaintiff on administrative leave after her own admitted abuse of alcohol and drugs given the fact that she had a stressful and hazardous job. In good conscience, defendants could not place on the streets of their city a fire fighter-emergency medical technician who was not able to perform her job responsibilities in potentially life and death circumstances. It was reasonable to require plaintiff to undergo a physical examination and to require her to supply an official letter from her treating psychiatrist that she was able to perform her duties.

Finally, there is evidence that plaintiff worked to frustrate the ability of defendants to take prompt and adequate remedial action by refusing to pursue her complaint with Sergeant Taiclet of the Streetsboro Police Department, refusing to submit to a polygraph examination, and refusing to report the harassing conduct as it occurred. Contrary to plaintiff's contention, the evidence indicates that defendants were not retaliating against plaintiff in placing her on administrative leave, but continued during that time to try to get to the bottom of this alleged sexual harassment. For all these reasons, the district court is affirmed on this issue.

DOWD, J.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Alison Ward,	)	
	)	
Plaintiff,	)	
	)	Case No. 5:94 CV 0643
v.	)	
	)	
City of Streetsboro, et al.,	)	**MEMORANDUM OPINION**
	)	
Defendants.	)	(Resolving Docket No. 16)
	)	

Before the Court is the defendants' motion for summary judgment (Docket No. 16), plaintiff's memorandum in opposition (Docket No. 21), and defendants' reply (Docket No. 31). For the reasons discussed below, the motion is granted.

I. BACKGROUND

Plaintiff, Alison Ward, has been employed by the City of Streetsboro as a part-time fire fighter/EMT since October of 1991. On March 28, 1994, Ward filed this lawsuit under Title VII alleging that she has been subjected to a hostile work environment sexual harassment and retaliation. Besides the City of Streetsboro ("the City"), plaintiff named as defendants Mayor Sally Hensel and Fire Chief Gerald Vicha.

Plaintiff alleges that, beginning in July of 1992, she was subjected to a series of harassing events, including being accused of having an affair with another fire fighter, receiving letters of a threatening nature, receiving a dead rat in her home mailbox, receiving numerous hang-up telephone calls at both her home and the fire station, having water placed in her fire boots, having her name whited out of the department sign-up book, having her name tag torn off her departmental mailbox, having eggs put in her fire boots, having her name blacked out on a department log sheet, having her portable radio taken without her consent and returned two days later with the words "ha,ha" written on it, having eggs placed in her fire gloves, and having her department uniform shirt, badge and fire gloves taken. (Ward Depo., Exhibit A). The person or persons who perpetrated these actions are unknown to this day.

Plaintiff claims that because she complained about these incidents, which she viewed as sexual harassment, she was subjected to retaliatory administrative leave. She also alleges that the City did not respond to her complaints in an adequate or timely fashion.

II. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P.56. When considering a motion for summary judgment, "the inferences to be drawn from the underlying facts contained in [affidavits, pleadings, depositions, answers to interrogatories, and admissions] must be viewed in the light most favorable to the party opposing the motion." U.S. v. Diebold, Inc., 369 U.S. 654,655 (1962). See, e.g., U.S. v. Hodges X-Ray, Inc., 759 F.2d 557,562 (6th Cir. 1985) and cases cited therein. The

Court's favorable treatment of facts and inferences, however, does not relieve the nonmoving party of the responsibility "to go beyond the pleadings" to oppose an otherwise properly supported motion for summary judgment under Rule 56(e). See Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986).

Once the moving party satisfies his or her burden to show an absence of evidence to support the nonmoving party's case, Celotex Corp. v. Catrett, 477 U.S. at 323, the party in opposition "may not rest upon mere allegation or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986). Although the showing required of the nonmoving party by Rule 56 does not go so far as to require that all opposition evidence be in a form admissible at trial, the rule does require the nonmoving party who has the burden of proof at trial to oppose a proper summary judgment motion "by any of the kinds of evidentiary material listed in Rule 56(c), except the mere pleadings themselves...." Celotex Corp. v. Catrett, 477 U.S. at 324. General averments or conclusory allegations of an affidavit, however, do not create specific fact disputes for summary judgment purposes. See Lujan v. National Wildlife Federation, 497 U.S. 871, 888-89 (1990). Furthermore, unsworn statements and affidavits composed of hearsay and non-expert opinion evidence, "do not satisfy Rule 56(e) and must be disregarded." See Dole v. Elliott Travel & Tours, Inc., 942 F.2d 962, 968-69 (6th Cir. 1991) (quoting State Mutual Life Assurance Co. v. Deer Creek Park, 612 F.2d 259,264 (6th Cir. 1979) and citing Adickes v. S.H. Kress & Co., 398 U.S. 144, 158 n.17 (1970). Nor may a party "create a factual issue by filing an affidavit, after a motion for summary judgment has been made, which contradicts ... earlier deposition testimony." Reid v. Sears Roebuck & Co., 790 F.2d 453, 460 (6th Cir. 1986) (citing Biechell v. Cedar Point,

Inc., 747 F.2d 209,215 (6th Cir. 1984).

On a motion for summary judgment, the Court will consider "[o]nly disputes over facts that might affect the outcome of the suit under the governing law." Anderson v. Liberty Lobby, 477 U.S. at 248. Non-material facts will not be considered. Neither will the judge attempt to weigh the material evidence or determine its truth. Anderson v. Liberty Lobby, 477 U.S. at 249. The judge's sole function will be to determine whether there is a genuine issue for trial such that "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Id. (citations omitted).

Where the nonmoving party "has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof," summary judgment is appropriate. Celotex Corp. v. Catrett, 477 U.S. at 323 (equating the standard for a directed verdict under Rule 50(a) with the summary judgment standard of Rule 56). If the evidence is "merely colorable," or is "not significantly probative," the Court may decide the legal issue and grant summary judgment. Anderson v. Liberty Lobby, 477 U.S. at 249-50 (citing Dombrowski v. Eastland, 387 U.S. 82 (1967) (per curiam) and First National Bank of Arizona v. Cities Service Co., 391 U.S. 253,290 (1968)). '"The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient, there must be evidence on which the jury could reasonably find for the plaintiff."' Street v. J.C. Bradford & Co., 886 F.2d 1472,1477 (6th Cir. 1989) (quoting Anderson v. Liberty Lobby, 477 U.S. at 252).

In sum, "[t]he inquiry performed is the threshold inquiry of determining whether there is the need for a trial -- whether, in other words, there are any genuine factual issues that

properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." Anderson v. Liberty Lobby, 477 U.S. at 250.

III. DISCUSSION

Title VII makes it unlawful for an employer to discriminate against an individual because of the individual's gender. 42 U.S.C. § 2000e-2(a)(1). There are two theories commonly raised in sexual discrimination cases: (1) the quid pro quo theory, that is, that the employer required sexual favors in return for a job benefit; and (2) the hostile environment theory, that is, that the employee was subjected to unwelcome sexual harassment because of his or her gender and that the harassment affected a term, condition or privilege of employment. Here the plaintiff has asserted her claims only under the second theory.

An employer can be held liable on a theory of respondeat superior for the harassing conduct of its employees toward other employees if the employer knew or should have known of the harassment and failed to take prompt and effective remedial action.

The defendants argue that the actions directed at the plaintiff were not sexually harassing because they were not sexual in nature. The Court finds this argument to be without merit. The statute prohibits discrimination because of one's sex. It appears that, at the relevant time, Ward was the only female in the traditionally male role of fire fighter. It is entirely conceivable that she was subjected to all of these actions for the simple reason that she was a female and the other fire fighters wanted to put pressure on her, drive her out, or make her the butt of unpleasant jokes and incidents solely for

their own enjoyment. There is no evidence that any other fire fighter was subjected to this type of harassing behavior.

Presuming for the sake of this motion that the plaintiff can establish her prima facie case of sexual harassment, the defendants would be liable on a theory of respondeat superior only if they knew or should have known of the harassment and failed to take action.

There appears to be no dispute that the defendants were placed on notice that plaintiff was being subjected to the various incidents of which she complains. Nobody even disputes whether the various incidents occurred. Everyone agrees, however, including the plaintiff, that the person or persons responsible for the incidents were, and still are, completely unknown. Plaintiff complains that the defendants should have installed a surveillance camera but did not. She also complains that the City did not investigate her complaints soon enough.

Defendant Vicha testified in his deposition that the fire department phones were tapped, (Vicha Depo. at 16-17). He also issued a directive to all fire fighter employees that harassment would not be tolerated. (Id. at 27-28). He met with other employees after the incident where plaintiff found eggs in her boots and informed the employees that such behavior would not be tolerated. (Id. at 26). Vicha appointed an internal affairs officer to try to ascertain the identity of the person or persons engaging in the harassing conduct. (Id. at 29-30). Vicha investigated each of the harassing incidents by questioning fire fighters as to their knowledge (Id. at 38-39). In fact, an outside police investigation was conducted, including the use of polygraph tests, fingerprinting and handwriting analyses, interviews of fire fighters and written statements. (Id. at 111-112).

In general, plaintiff complains that these steps were inadequate and ineffective to stop the harassment. She asserts that a surveillance camera should have been used because it would have stopped the harassment. Apparently another fire fighter, a friend of the plaintiff, arranged for a surveillance camera to be loaned to the fire department. However, Chief Vicha testified at his deposition that, although the camera was received, it was never used because there was no place in the building to conceal it while it could be focused on the plaintiff's equipment. It was his judgment that the perpetrator(s) would not act while a camera was in full view and that installing a visible camera would only delay, not stop the harassment. He testified that the camera could not be permanently installed, so as to permanently stop the harassment, because it was borrowed equipment. (Vicha Depo. at 21-24). A discussion was had regarding the possibility of purchasing a surveillance camera, but it was concluded that there were no funds in the budget for such purchase. (Id. at 24-25). Vicha, therefore, made the judgment call that a temporary surveillance camera would not be permanently effective and would not assist in locating the perpetrator(s).

Although this Court accepts the fact that an employer will be held liable for failure to take prompt and adequate remedial action were there is a known perpetrator, the Court does not believe the an employer is expected to do more than this employer tried to do to ascertain the identity of the perpetrator or perpetrators. The employer cannot be a mind-reader and the employer cannot stop something whose source is unknown. Therefore, the Court finds no basis for asserting respondeat superior liability under these facts.

Title VII also prohibits an employer from retaliating against an employee who asserts his or her rights under the Act.

Defendant argues that if plaintiff fails to establish sexual harassment, then she cannot allege a claim of retaliation. This is not so. If a plaintiff perceives that he or she is being sexually harassed and thereafter complains to his or her employer, even if it turns out that the employee was not harassed, it is possible that the employer retaliated against the plaintiff for having complained, that is, for having asserted his or her legitimate rights.

Plaintiff asserts that, because she complained about being harassed and because she refused to submit to a polygraph test as part of the police investigation, she was retaliated against by being placed on administrative leave.

The evidence here, however, indicates that Chief Vicha became increasingly concerned about plaintiff's emotional stability and its effect upon her job performance, including concern that below par performance could endanger not only the plaintiff but other fire fighters. (Vicha Depo. at 102-104). For that reason, plaintiff was placed on three weeks administrative leave, the same treatment any other fire fighter would have received in like circumstances. Following the leave, she could return to work if she had a doctor's statement relating to her fitness and if she underwent a physical examination. Apparently that occurred.

There is no evidence that the administrative leave was retaliatory. There is no evidence that the requirement of a polygraph test was anything more than an attempt to get to the bottom of the alleged harassment. Other fire fighters were subjected to polygraphs in addition to the plaintiff. However, plaintiff refused to cooperate with the investigation. Chief Vicha stated that, when investigations turned up no leads, he began to suspect that the plaintiff was doing all these things to

herself for some unknown reason. (Vicha Depo. at 98).

The Court concludes that the plaintiff has failed to establish a prima facie case of retaliation. Thus defendants are entitled to summary judgment on that portion of the plaintiff's complaint.

IV. CONCLUSION

The Court concludes that there are no issues of material fact in dispute and that the defendants are entitled to summary judgment on plaintiff's complaint. A judgment entry to that effect will be separately issued.

IT IS SO ORDERED.

/s/_____
David D. Dowd, Jr.
U.S. District Judge

DOWD, J.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Alison Ward,	)	
	)	
Plaintiff,	)	
	)	Case No. 5:94 CV 0643
v.	)	
	)	
City of Streetsboro, et al., et al.,	)	**JUDGMENT ENTRY**
Defendants.	)	

For the reasons set forth in the Memorandum Opinion filed contemporaneously with this Judgment Entry, IT IS HEREBY ORDERED, ADJUDGED and DECREED that summary judgment is entered in favor of all defendants on all of plaintiff's claims. Case closed.

/S/_____
David D. Dowd, Jr.
U.S. District Judge

DOWD, J.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Alison Ward,	)	
	)	
Plaintiff,	)	
	)	Case No. 5:94 CV 0643
v.	)	
	)	
City of Streetsboro, et al.,	)	**MEMORANDUM**
	)	**OPINION AND ORDER**
Defendants.	)	(Resolving Docket (No. 35)

Before the Court is plaintiff's motion (Docket No. 35), filed pursuant to Fed. R. Civ. P. 59(e), to alter or amend the judgment entered on May 23, 1995. Defendant filed a memorandum in opposition (Docket No. 36). No reply brief was filed. For the reasons discussed briefly below, the motion is denied.

Plaintiff argues, quite simply, that this Court's granting of summary judgment in favor of the defendants was wrong because, in plaintiff's view, there was evidence in the record which showed that the fire department owned a camcorder which it could have permanently installed as a means of stopping the harassing conduct which was the subject of this lawsuit. This fact, however, does not alter the Court's conclusion that, in the face of an admittedly unknown perpetrator, the defendants took reasonable steps to stop the harassment. The fact that the plaintiff might have done

something different does not render defendants' remedial actions insufficient as a matter of law.

Accordingly, plaintiff's motion to alter or amend the judgment (Docket No. 35) is denied.

IT IS SO ORDERED.

/s/_____
David D. Dowd, Jr.
U.S. District Judge

No. 95-3838
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ALISON WARD,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	**ORDER**
	)	
CITY OF STREETSBORO, et al.,	)	
	)	
Defendants-Appellees.	)	

BEFORE: KENNEDY, JONES, and CONTIE, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied

ENTERED BY ORDER OF TH E COURT

/s/_____
Leonard Green, Clerk